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No. 86-523

In The

Supreme Court of the United States

OCTOBER TERM, 1986

MOSHER STEEL COMPANY, DIVISION OF TRINITY INDUSTRIES, AND ROGER LOVE, Plant Manager,
Petitioners,

v.

WILLIAM E. BROCK, Secretary of Labor,
United States Department of Labor,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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MISCELLANEOUS

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There is an inherent difference betwen an inspection based on an employee's complaint, which is analagous to *Franks v. Delaware,* 438 U.S. 154 (1978), and an inspection based on OSHA's administrative inspection plan. In the former instance there is some assurance that violations of law exist. In the latter instance, the plan itself provides the only evidence to be weighed against the employer's privacy interest. *Brock v. Gretna Machine & Ironworks,* 769 F.2d 1110,1112 (5th Cir. 1985). Thus, judicial review of the plan is

necessary to insure that an employer's Fourth Amendment privacy rights are protected. Judicial review of the plan is also necessary to protect the employer's Fifth Amendment due process right to fair, even-handed enforcement of the Act.

The importance of the fairness of OSHA's inspection plan has been magnified by the Fifth Circuit's recent application of *I.N.S. v. Lopez-Mendoza,* 468 U.S. 1032 (1984) to OSHA warrant cases. In *Smith Steel Casting Co. v. Brock,* 800 F.2d 1329 (5th Cir. Sept. 19, 1986), the court interpreted *Lopez-Mendoza* to mean that even if the Secretary obtains a warrant and inspects pursuant to a discriminatory, unfair plan, the evidence of violations will not be supressed. Rather, the exclusionary rule will only apply to the monetary penalties assessed by OSHA.

In the past, the Secretary's only incentive to comply with the Fourth and Fifth Amendments has been the prospect that all evidence obtained under an invalid warrant might be suppressed. The Secretary, and particularly his agents in the field, are not motivated by the assessment of monetary penalties. Indeed, in most cases the penalties are insignificant compared to abatement or litigation costs. Thus, the application of *Lopez-Mendoza* to OSHA warrant cases leaves the Secretary absolutely no incentive to comply with the Fourth and Fifth Amendments in the enforcement of the Occupational Safety and Health Act. Under these circumstances, a declaration as to the fairness of OSHA's selection procedure —*i.e.,* the plan, becomes even more important.

In deciding whether to grant Mosher's petition this Court must consider whether the magistrate can conduct a meaningful review of the design and operation of OSHA's inspection plan in an *ex parte* warrant application. The Secretary

argues that he can, and that if the plan is unfair the remedy is for the migistrate to simply not issue the warrant. Trial judges, however, have long recognized that, in practice, the Secretary's position "blinks at reality."[1] "In an *ex parte* motion the Magistrate cannot be expected to conduct a focused and detailed inquiry into the manner in which a plan is designed to operate." *Brock v. Gretna Machine & Ironworks, supra.*[2] "[C]ertain aspects of the plan," such as whether it "has an alleged discriminatory effect" can not be "considered by the magistrate in issuing the search warrant." *Donovan v. Hackney, Inc.*, 583 F.Supp. 773, 776 (W. D. Okla. 1984) aff'd 769 F.2d 650 (10th Cir. 1985) cert. denied No. 85-874 (March 14, 1986). Professor LaFave likewise affirms that in an *ex parte* warrant proceeding, the arbitrariness of the plan is "a matter not considered by the magistrate." LaFave, *Search and Seizure, A Treatise On The Fourth Amendment*, § 10.2 pp. 224-226 n.66. This is precisely Judge Tuttle's point below when he notes "a mere surface examination of the plan [in an *ex parte* warrant proceeding] may not insure that the plan in its development and actual operation has been conducted in the 'reasonable' and 'neutral' manner required by the Supreme Court." *Donovan v. Mosher Steel Co.*, 791 F.2d 1535, 1540 (11th Cir. 1986).

The Secretary's contention in his Brief In Opposition that the magistrate is provided "all of the information needed" (p. 8-9) to determine the reasonableness of the plan is

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[1]To quote then District, Judge Patrick Higginbotham in *Marshall v. Huffhines Steel Company*, 488 F.Supp. 995 (N.D. Tx. 1979), aff'd *sub nom Donovan v. Huffhines Steel Company*, 645 F.2d 288 (5th Cir. 1981), p. 40, Transcript of proceedings, October 12, 1979.

[2]Quoting District Judge Heebe in his preliminary Order of February 14, 1983, granting discovery into OSHA's plan. See Appendix A at n. 4. In the district court the case was styled *Donovan v. Gretna Machine & Ironworks, Inc.*

simply not correct. For instance, it cannot be disputed that the underlying establishment lists are essential to the operation of the plan. If those lists are incomplete and inaccurate, then whole groups of employers are *de facto* exempted from inspection, while those who are on the lists are subjected to repeated inspections. Yet, the Secretary acknowledges that these lists are not provided to the magistrate (p. 8-9) and the magistrate has no way to verify that the lists are reasonably accurate.[3]

It is not Mosher's motive to "stop OSHA", but to obtain fair, even-handed enforcement of the law. Review of information presented to magistrates in a number of OSHA warrant cases, together with limited discovery in some cases, and actual experience, indicates that OSHA's inspection plan exempts large numbers of high hazard employers — including many of Mosher's competitors — from enforcement of the law, while subjecting a small percentage of employers to repeated inspections. Mosher has therefore brought a declaratory judgment action seeking meaningful judicial review of the fairness of OSHA's inspection plan, and whether it provides for selective enforcement. The Secretary's argument that discovery into the plan would impose an impossible burden on the government is belied by actual experience in other cases. As noted before the district court, the Secretary has agreed to such discovery in previous cases and the discovery took less than a day to complete. And, of course, any confidential documents can be protected by

[3]The Secretary's statement that the lists (purchased from Dunn & Bradstreet) contain the names of "all establishments" in the so-called high hazard industries is flatly untrue. Routine comparison of information provided to the magistrate with such sources as manufacturing directories published by state chambers of commerce indicates that OSHA's establishment lists are *grossly* inaccurate, and frequently do not include *many* of the establishments in high hazard SIC groups — including some direct competitors.

suitable protective orders. A judicial determination that OSHA's inspection plan is reasonable would ultimately result in *less* litigation. Mosher seeks a judicial hearing in the instant case because of a good faith belief that the plan used by OSHA is unreasonable and discriminatory. OSHA's steadfast refusal to allow Mosher to examine the plan substantiates the belief there is something very wrong with the plan. On the other hand, if OSHA can demonstrate its plan is constitutional, any employer would be most reluctant to risk the court's contempt and incur the legal expense of challenging a warrant. Thus, judicial review of OSHA's inspection plan would not result in "litigation laden delays" as long as OSHA can demonstrate it has a reasonable plan. Instead, express judicial approval of OSHA's plan would result in even fewer employers demanding a warrant because of their knowledge they were selected for inspection pursuant to a reasonable system.

CONCLUSION

As stated previously, the pivotal issue is whether the Secretary's administrative selection plan is subject to meaningful judicial review. Or, put another way, is the Secretary required to act openly and fairly in the enforcement of the Act? Judge Tuttle below recognized that the plan may be "inherently discriminatory" and "invideous". 791 F.2d at 1541. To sanction the existence of such a plan by casually issuing a warrant for its enforcement destroys public confidence in government. *Id.* The principles announced in *Franks* should therefore not be "mechanically applied" to administrative warrants. *West Point-Pepperell, Inc. v. Donovan*, 689 F.2d 950, 963 (11th Cir. 1982) (Judge Roney, specially concurring). More importantly, *Franks* should not

be mechanically applied to preclude a declaratory judgment action challenging OSHA's entire inspection plan on both Fourth and Fifth Amendment grounds.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of December 1986, three copies of this Petition for Writ of Certiorari were placed in the United States Mail, certified, return receipt requested, postage prepaid, to counsel for all parties required to be served, said parties being Mr. Charles Fried, the Solicitor General, Department of Justice, Washington, D.C. 20530, and Andrea Casson, U.S. Department of Labor, Room S 4004, Washington, D.C. 20210.

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APPENDIX A

RAYMOND J. DONOVAN, Secretary of Labor, United States Department of Labor

v.

GRETNA MACHINE AND IRONWORKS, INC., and MARTIN DE MATTEO

CIVIL ACTION

NO. 82-1507

SECTION "F" (B)

O R D E R

This cause came on for hearing on a previous day on motion of plaintiff to review Magistrate's findings.

The Court, having heard the arguments of counsel and having studied the legal memoranda submitted by the parties, is now fully advised in the premises and ready to rule. Accordingly,

IT IS THE ORDER OF THE COURT that Gretna Machine and Ironworks SHALL BE ALLOWED to conduct discovery as to the formulation and operation of the plan relied upon to establish probable cause.

IT IS THE FURTHER ORDER OF THE COURT that Gretna Machine and Ironworks shall NOT BE PERMITTED to conduct discovery into any matter not relied upon by OSHA to establish administrative probable cause for the inspection.

REASONS

In this action, the Occupational Safety and Health Administration (OSHA) seeks to have Gretna Machine and Ironworks (Gretna) adjudged in civil contempt for failure to allow an inspection pursuant to a search warrant. Currently before the Court are certain requests for discovery by the defendant. At issue is the scope of the discovery, if any, to be allowed.

In Marshall v. Barlow's, Inc., 436 U.S. 307 (1978), the Supreme Court held that the Fourth Amendment requires a programmed OSHA inspection to be conducted pursuant to a warrant and scheduled "pursuant to an administrative plan containing specific neutral criteria." *Id.* at 323. Pursuant to this mandate, OSHA created a series of plans, including CPL 2.25A. Relying upon CPL 2.25A to establish administrative probable cause, OSHA obtained a search warrant and attempted to make a programmed health inspection of defendant's premises. Gretna dishonored the warrant, prompting this complaint for civil contempt. Gretna has answered the complaint and counterclaims for a judgment declaring that the programmed health inspection procedure violates the Fourth and Fifth Amendments. The discovery is sought to aid in the defense of the complaint and in the prosecution of the counterclaim.

Gretna contends that the affidavit upon which the warrant was issued is defective; moreover, they contend that the administrative plan, pursuant to which the inspection was scheduled, is not based on neutral criteria.

In Franks v. Delaware, 438 U.S. 154 (1978) the Supreme Court held that a challenge to a warrant will be limited to the sufficiency of the warrant and affidavits. If a substantial preliminary showing can be made that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included in the affidavit, and that the affidavit without such statement is insufficient, the defendant will be entitled to an evidentiary hearing at which the warrant can be voided. Conversely, if a substantial preliminary

showing is not made, matters not appearing on the face of the affidavit will not be considered and will be irrelevant. The Federal Rules of Civil Procedure provide that matters which are irrelevant are not discoverable. Fed. R. Civ. P. 26(b), 33, 34.

While the so-called *Franks* "four corners" doctrine was announced in the criminal context, the jurisprudence has extended its application to OSHA warrants. West Point-Pepperell, Inc. v. Donovan, 689 F.2d 950, 959 (11th Cir. 1982); Marshall v. Horn Seed Co., 647 F.2d 96, 104 (10th Cir. 1981); In re J. R. Simplot Co., 640 F.2d 1134, 1138 (9th Cir. 1981).

In the instant case, no substantial preliminary showing has been made that false statements were deliberately or recklessly made in the affidavit. Accordingly, Gretna will not be entitled to a *Franks* evidentiary hearing into matters not appearing on the face of the warrant, nor may discovery be had into matters relevant only at a *Franks* hearing.

Gretna's second argument is that the plan was not based on neutral criteria and, therefore, does not establish probable cause. The *Franks* doctrine does not preclude this challenge to the sufficiency of the affidavit and attachments to establish administrative probable cause. Such a challenge is analogous to a challenge to the sufficiency of factual assertions to establish probable cause in a criminal warrant. In a criminal warrant the question is whether the affidavit taken as true establishes probable cause. The somewhat different question for a programmed administrative inspection warrant is whether the plan meets the neutrality requirements of *Marshall v. Barlow's, Inc., supra.* A proper subject of inquiry at this stage is the manner in which CPL 2.25A actually operates to select businesses for inspection.

According to CPL 2.25A and its Appendix A, "Health Inspection Plan," health inspections are scheduled according to a potential risk formula.[1] This formula was created by

[1]This is different from safety inspections, which are scheduled on the basis of accident experience in the industry. CPL 2.25A, p.2, E3a.

a process of extrapolation described in the appendix. A panel of experts in toxicology reviewed the literature in their field and assigned a hazard weight figure, or hazard rating, to each of numerous substances. It was then determined which industries[2] used which of these substances, and the industry was similarly rated. Industries using multiple substances were assigned some combined hazard weight. Then the appropriate hazard weight for each industry was multiplied by two other figures: an industry average employment figure and a degree of exposure figure. The result is a number designed to represent the relative health hazards presented to employees in various industries. Industries are ranked based on this number and certain industries are then designated high hazard industries. Businesses engaged in those industries are subject to inspection. Businesses actually inspected are chosen randomly from a list of area businesses engaged in high health hazard industries.[3]

The designation as a high hazard industry is a critical step in the process of inspection scheduling because it is OSHA policy to conduct at least 95% of its inspections in high hazard industries and no more than 5% elsewhere. CPL 2.25A, p.2, E3. It follows then that, in order for the whole selection process to be neutral, designation as high hazard must also be neutral. The Health Inspection Plan fails to completely describe the "*specific* neutral criteria," 436 U.S. at 323 (emphasis added) used in the calculations relied upon by OSHA in making high hazard designations. While the Health Inspection Plan may expedite the issuance of a warrant by briefly summarizing the process by which industries are designated high hazard, this practice cannot insulate this part of the probable-cause-creating process from

[2]The Standard Industrial Classification (SIC) scheme of categorization is used.

[3]It is well settled that this random selection process comports with the commands of *Barlow's*. Stoddard Lumber Co. v., Marshall, 627 F.2d 984 (9th Cir. 1980); Ingersoll Rand Co. v. Donovan, 540 F.Supp. 222 (M.D. Penn. 1982); Matter of Chicago Aluminum Casting Co., 535 F.Supp. 392 (N.D. Ill. 1981). In fact, it has been suggested that any random selection process of businesses in an industry would satisfy *Barlow's*. Matter of Urick Property, 472 F.Supp. 1193 (W.D. Penn. 1979).

discovery.[4] The entire plan used to schedule the inspection of Gretna, even if it is not mechanically included in the affidavit, is necessarily incorporated by reference, is part of the asserted foundation for probable cause, and is therefore subject to challenge in this suit. The operation of the plan is in issue and is subject to discovery.

OSHA raises two arguments in opposition to the discovery of the probable-cause-creating process. They contend that by permitting discovery of this process OSHA will be unduly burdened. We do not agree. In allowing discovery as set forth herein, OSHA would not be required to demonstrate that individual businesses are high risk; rather they need only demonstrate the health risk by industry, and show that the business to be inspected is engaged in that industry. Stoddard Lumber Co. v. Marshall, 627 F.2d 984 (9th Cir. 1980). The material necessary for such a showing is contained within agency files and need only be assembled once to establish the probable cause for any search made pursuant to that plan.

Moreover, it is unlikely that such a serious challenge will be mounted to every warrant issued or requested. "[T]he great majority of businessmen can be expected in normal course to consent to inspection. . . ." *Barlow's, supra*, 436 U.S. at 316. The Supreme Court's reasonable assumption belies the floodgates argument, in the absence of evidence to the contrary.

OSHA further contends that the material is priveleged. This argument is unconvincing. Providing information on the operation of the plan cannot subject anyone to criminal

[4]This is not to suggest that the Magistrate should have required more information about CPL 2.25A before issuing the warrant. As already noted, a programmed inspection plan is different in kind from the usual showing of probable cause. Probable cause is not established by the reporting of facts, but rather is created by the following of a procedure. In an ex parte motion the Magistrate cannot be expected to conduct a focused and detailed inquiry into the manner in which a plan is designed to operate. Such an inquiry should await the interested assistance of adversaries, if it becomes necessary.

penalties under 29 U.S.C. § 666(f).[5] Under the plan as described in the material submitted to the Magistrate, it would be impossible to predict which business will be inspected without having OSHA's random number table. Neither Gretna nor anyone else has this random number table. Also, the statute was clearly not designed to prohibit this discovery, but rather to prohibit inside tipping of businesses already scheduled.

Likewise, this discovery will not invade OSHA's deliberative process. It is irrelevant why OSHA chose a particular process, value or statistic in developing this plan. What was chosen, on the other hand, is extremely relevant, and has been placed in issue by OSHA itself.

We consider the ordered discovery to be implicitly mandated by *Barlow's, supra.* The Court's stated purpose in that case was to limit the scope of 29 U.S.C. § 657(a), which authorized inspection of business premises without requiring a warrant, and thereby to restrict the exercise of OSHA's "unbridled discretion. . . as to when to search and whom to search." 436 U.S. at 323. In furtherance thereof, the Court held that a search must be ordered by a neutral officer, and scheduled pursuant to reasonable, objective and fair standards; stating, in effect that businessmen must be given a fair roll of the dice. By their refusal to allow discovery OSHA is permitting businessmen to see the dice roll, but won't allow them to check if the dice are loaded. OSHA is seeking to hide from view precisely what *Barlow's* has required to be demonstrably fair. In so doing they violate both the spirit and the letter of the law.

Accordingly, for the reasons herein expressed, Gretna Machine and Ironworks SHALL BE ALLOWED to conduct discovery as to the formulation and operation of the plan relied upon to establish probable cause. Further, Gretna Machine and Ironworks SHALL NOT BE PERMITTED to conduct discovery into any matter not relied upon by OSHA to establish administrative probable cause for the inspection.

Frederick J. R. Heebe

[5]This section prohibits the giving of advance notice of a scheduled inspection.